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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

SHEET METAL WORKERS LOCAL NO. 141
SUPPLEMENTAL UNEMPLOYMENT
BENEFIT TRUST FUND,

Petitioner,

v.

UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

HAROLD G. KORBEE
2500 Cincinnati Commerce Center
600 Vine Street
Cincinnati, Ohio 45202
(513) 852-6082
(513) 852-6087 (Fax)

Attorney for Petitioner

STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in holding that upon the termination of the Local 141 Supplemental Unemployment Benefit Fund, the distributions of a "residual balance" which constituted a reserve generated solely by prudent investments and competent administration of the Local 141 SUB Fund assets are wages subject to social security and unemployment taxes.

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I. STATEMENT OF THE CASE

A. Procedural History

This action arises from the termination of the Sheet Metal Workers Local 141 Supplemental Unemployment Benefit Trust Fund ("Local 141 SUB Fund") and the distribution of the assets to some of its participants and beneficiaries. This issue presents the Court with a question of first impression regarding whether the distribution which is based upon factors other than services rendered to the employer are "wages" within the meaning of the Federal Insurance Contribution Act ("FICA"), 26 U.S.C. § 3101 *et seq.*, and the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. § 3306 *et seq.*

Local 141 SUB Fund instituted this action on October 30, 1992, to recover taxes it had paid under FICA and FUTA on the distribution of a reserve that had been accumulated over a period of years through prudent investments and competent administration of the Local 141 SUB Fund. (R. 1: Complaint). The distributions were made to participants according to their Union membership status and length of participation in the plan. Local 141 SUB Fund brought this action because it believed the distributions were not "wages" as defined by FICA and FUTA and, therefore, not subject to tax.

On February 9, 1993, Local 141 SUB Fund filed a motion for summary judgment. (R. 7: Local 141 SUB Fund Motion for Summary Judgment). On March 12, 1993, the Court held a preliminary pretrial conference and extended the time within which the IRS had to respond to Local 141 SUB Fund's motion for summary judgment

until May 1, 1993. (R. 9: Scheduling Order). The Court granted the IRS a lengthy response time so it could conduct any discovery necessary to respond to the motion for summary judgment. The IRS chose to conduct no discovery but instead filed a cross-motion for summary judgment on April 30, 1993. (R. 10: IRS's Motion For Summary Judgment). Local 141 SUB Fund filed a timely reply on May 24, 1993. (R. 11: Local 141 SUB Fund's Memorandum in Opposition to IRS's Motion for Summary Judgment). The Court then referred the matter to Magistrate Sherman for his recommendation on all dispositive pretrial motions. (R. 12: Order of Reference).

On February 23, 1994, Magistrate Sherman issued his recommendation granting Local 141 SUB Fund's motion for summary judgment; denying the government's cross-motion for summary judgment; awarding Local 141 SUB Fund $97,773.23 in FICA and FUTA refund monies, plus interest; and terminating the action from the docket. (*Sheet Metal Workers Local 141 Supplemental Unemployment Benefit Trust Fund v. United States,* 1994 U.S. Dist. LEXIS 3022 (S.D. Ohio 1994); R. 13: Magistrate's Report and Recommendation; Appendix pages 1-7). The IRS filed objections to the Magistrate's Report and Recommendation to which Local 141 SUB Fund responded. (R. 14: IRS's Objections; R. 15: Local 141 SUB Fund's Response to IRS's Objections). On April 15, 1994, the District Court adopted the magistrate judge's report granting Local 141 SUB Fund's motion for summary judgment and denying the IRS's motion for summary judgment. (R. 16: Order Adopting Magistrate's Report and Recommendation). The District Court entered judgment in Local 141 SUB Fund's favor and awarded it $97,773 in FICA

and FUTA tax refund monies plus interest. (R. 17: Judgment). The IRS filed an appeal from the final judgment. The Sixth Circuit reversed the District Court on September 5, 1995, 64 F.3d 245 (6th Cir. 1995) (Appendix pages 8-21).

B. Statement of Relevant Facts

Local 141 SUB Fund was an employee welfare benefit plan as defined by ERISA, 29 U.S.C. § 1001 *et seq.*, and was created pursuant to the Taft-Hartley Act, 29 U.S.C. § 186, for the primary purpose of providing supplemental unemployment benefits to members of Sheet Metal Workers Local No. 141 ("Local 141") who became involuntarily unemployed. (R. 7: Local 141 SUB Fund Motion for Summary Judgment, Exh. A, Geis Affidavit ¶3).[1] In 1987, Local 141 was consolidated and amalgamated with Sheet Metal Workers Local No. 24. (R. 7: Local 141 SUB Fund Motion for Summary Judgment, Exh. A, Geis Affidavit ¶4). After consolidation, Local 141 members voted to recommend to Local 141, the association representing the contributing employers, and to the Local 141 SUB Fund Trustees, the termination of the Local 141 SUB Fund. (*Id.*). The Local 141 SUB Fund Trustees then voted to terminate the Fund.

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[1] The affidavit of Donald Geis is attached to the motion for summary judgment of Local 141 SUB Fund. Donald Geis was a member of the Board of Trustees of the Local 141 SUB Fund. (Geis Affidavit ¶2).

1. The Positive Account Balance Distribution

The assets remaining in the Local 141 SUB Fund at termination were distributed according to the Local 141 SUB Fund Trust Agreement and Plan. (*Id.*) at ¶5. Following the Trust Agreement and Plan, the Local 141 SUB Fund made two distributions of its assets. The first distribution made was a payment to each Local 141 SUB Fund participant or former participant in an amount equal to that participant's "positive account balance." (*Id.* at ¶6). The "positive account balance" consisted of the contributions participants' employers paid into the Local 141 SUB Fund on behalf of the participant minus the benefits paid out of the Local 141 SUB Fund to that participant. (*Id.*). The total amount of this distribution was $1,839,292.77. FICA and FUTA payments were paid on the distribution of the "positive account balances" and are not the subject of Local 141 SUB Fund's refund claim. Each participant also paid federal income tax on this distribution.

2. The Residual Balance Distribution

After the distributions of the "positive account balances," a residual balance remained in the Local 141 SUB Fund (*Id.* at ¶8). The residual balance constituted a reserve generated by prudent investments and competent administration of the Local 141 SUB Fund assets. (*Id.*). Mr. Geis testified:

> *After the distribution of the individual positive account balances, a residual balance remained in the Local 141 SUB Fund. This residual balance constituted a reserve generated by prudent investments and competent administration of the contributions made*

> *to the Local 141 SUB Fund over a period of years dating back to 1975.*

(*Id.* at ¶8). Although given an opportunity to rebut this testimony, the IRS presented no contrary evidence.

Prior to distributing the residual balance, the Trustees filed a declaratory judgment action in the United States District Court for the Southern District of Ohio. *Local 141 SUB Fund v. Sheet Metal Workers Local No. 24*, Case No. C-1-89-183 (S.D. Ohio July 30, 1990) (Appendix pages 22-35). In *Local 141 SUB Fund v. Sheet Metal Workers Local No. 24*, the Trustees of the Local 141 SUB Fund sought the District Court's approval of their plan to terminate the Plan. The District Court found that only members and retired members of Local 141 were entitled to receive a payment from the residual balance. *Id.* at 9. The District Court further held that former Union members were not entitled to receive a payment from the residual balance because the Local 141 SUB Fund was only intended to benefit Union members. *Local 141 SUB Fund v. Sheet Metal Workers Local No. 24*, Case No. C-1-89-183, slip op. at 9 (S.D. Ohio July 30, 1990).

The residual balance was distributed to all participants who were Union members and who had five or more years of credited service in the Local 141 SUB Fund. (*Id.* at ¶9). The participant's share of the residual balance was based upon the participant's years of credited service in the Local 141 SUB Fund. (*Id.*). Section 9.1(A)(7) of the Plan provides how the residual balance was distributed:

> *In the event that there should be any Plan assets remaining after the payment set forth in paragraphs 1 through 6 of this Section, all remaining assets shall be converted to cash and distributed to all living*

> *Plan participants who have established five or more consecutive years of participation in the Sheet Metal Workers Local 141 Supplemental Unemployment Benefit Trust Fund and Plan, as determined by the Plan records on the plan termination date. Distribution shall be prorated to participants based on their years of service under the Plan to the Plan termination date. The Trustees shall determine the final distribution date following the Plan termination date.*

(R. 10: IRS's Motion for Summary Judgment, Exh. B, Thirty-Fourth Amendment).

The total amount of this distribution was $1,157,079.77. Again, each participant paid federal income tax on this distribution.

Before distributing the residual balance, Local 141 SUB Fund requested from the Internal Revenue Service a ruling as to whether or not the distribution of the residual balance constituted wages for FICA and FUTA purposes. (R. 7: Local 141 SUB Fund Motion for Summary Judgment, Exh. A, Geis Affidavit ¶10). On November 16, 1990, the IRS issued a private letter ruling stating that the residual balance was wages. (*Id.* at ¶11). The Trustees disagreed with this ruling but did not want to delay further the distribution to needy Plan participants. Local 141 SUB Fund subsequently filed a FUTA Tax Return, Form 940, and FICA Tax Return, Form 941, with the IRS and timely paid FICA taxes in the amount of $88,516.60 and FUTA taxes in the amount of $9,256.63. (*Id.* at ¶¶12-13). On February 11, 1992, Local 141 SUB Fund filed for a refund of the FICA and FUTA payments. (*Id.* at ¶4).

II. REASONS FOR GRANTING WRIT

The Appellate Court Erred In Holding That The Distribution Of The "Residual Account Balance" Constituted Wages Subject To Social Security And Unemployment Taxes.

FICA and FUTA mandate that all wages derived from employment are subject to tax. 26 U.S.C. § 3121(a); 26 U.S.C. § 3306(b). Wages for purposes of FICA and FUTA are all "remuneration" for any service. (*Id.*). It is uncontroverted that the residual balance was a reserve generated by prudent investments and competent administration of the contributions made to the Local 141 SUB Fund over a period of years. (R. 7: Local 141 SUB Fund Motion For Summary Judgment, Exh. A, Geis Affidavit ¶8). Thus, the residual balance is not attributable to services rendered by participants to employers who contributed to the Local 141 SUB Fund but is directly attributable to prudent investments and competent administration. The Sixth Circuit agreed with this conclusion but stated that this conclusion was not dispositive of the issue whether the "residual balance" constituted wages. *Sheet Metal Workers Supplemental Unemployment Trust Fund v. United States*, 64 F.3d at 248. To the contrary, the Sixth Circuit stated that the "residual balance" constituted wages if receipt of a "residual balance" payment was directly contingent on past or present employment. 64 F.3d at 250-51. In this case, the Sixth Circuit held that because it was not possible to participate in the Fund unless the person worked for a union contractor, the "residual balance" payments were directly contingent upon past or present employment, and, thus, were wages. 64 F.3d at 250-51.

The Sixth Circuit erred when it held that the origin of the residual balance, that is, prudent investment, is irrelevant in determining whether it is wages and, instead, the focus is on the basis upon which the remuneration is paid. The basis upon which remuneration is paid is immaterial in determining whether or not the remuneration constitutes wages. *SLA of Baltimore-ILA Container Royalty v. United States,* 621 F. Supp. 1567 D.C. Md. 1985) *aff'd,* 804 F.2d 296 (4th Cir. 1986); Treas. Reg. 31.3121(a)-1(d) and 31.3306(b)-1(d). To the contrary, the focus on determining whether or not remuneration is wages depends on the origin of the remuneration; that is, was the payment for any services. (*Id.*). Because the residual balance originated from prudent investment and not from any services, it is not wages and, therefore, not subject to FICA and FUTA taxes.

The Sixth Circuit further erred when it agreed with IRS claims, that the relationship between the payment of the residual balance and employment was direct and, therefore, it constitutes wages. The payment of the residual balance was not connected to a participant's employment status or to a participant's length of employment with an employer.[2] To the contrary, the payment was

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[2] Unlike the residual balance, the payment of the positive balance was directly linked to a participant's employment status and length of employment. The positive balance constituted contributions paid into the Local 141 SUB Fund by a participant's employers on behalf of the participant pursuant to the collective bargaining agreements, minus the benefits paid out of the Local 141 SUB Fund to the participant. R. 7: Local 141 SUB Fund Motion for Summary Judgment, Exh. A, Geis Affidavit ¶¶6-8). Thus, the positive balance was remuneration for services.

based solely upon a participant's status as a union member.[3] (R. 10: IRS's Motion for Summary Judgment, Exh. B, Thirty-Fourth Amendment). In other words, a participant only received a payment from the residual balance if he or she was a union member at termination. For example, if an employee of a contributing employer resigned from the Union and went to work for a non-union contractor and thus was no longer a participant in the Local 141 SUB Fund, he or she would not be eligible to receive a residual balance payment upon termination of the Fund. *Local 141 SUB Fund v. Sheet Metal Workers Local No. 24*, Case No. C-1-89-183 (S.D. Ohio July 30, 1990).

In *Local 141 SUB Fund v. Sheet Metal Workers Local No. 24*, the Trustees of the Local 141 SUB Fund sought the District Court's approval of their plan to terminate the Plan. The District Court found that only members and retired members of Local 141 were entitled to receive a payment from the residual balance. *Id.* at 9. The District Court further held that former Union members were not entitled to receive a payment from the residual balance because the Local 141 SUB Fund was only intended to benefit Union members. (*Id.*). The District Court stated:

> *Except for those members of the Union [Local 141] who participated in the SUB Plan and retired from the Union in good standing, those persons who have permanently separated from the trade, as defined in Article III, Section (B)(6), are not entitled to share in this final distribution, since the payment to them of*

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[3] To receive a residual payment, the participant had to be a Union member at termination and had to have had at least five years of participation in the Local 141 SUB Fund.

> *their positive balance, which has already been accomplished, "operates as a final and complete discharge of all claims for any other benefits payable under [the] Plan . . . " Article III, Section 3.13(B)(8).* ***This Plan was intended to benefit Union members, not to provide a windfall for those who left the Union to work for nonunion contractors.***

Local 141 SUB Fund v. Sheet Metal Workers Local No. 24, Case No. C-1-89-183, slip op. at 9 (S.D. Ohio July 30, 1990). (Emphasis added).

A participant's union status was *the* determining factor regarding whether the participant received a residual balance payment. Contrary to the Sixth Circuit's conclusion, a participant's employment status was not relevant in determining whether or not a participant received a residual balance payment. The Sixth Circuit reasoned that the residual payments were wages even though union status was the determining factor in receiving a residual payment, since employment by a union contractor was the *sine qua non* for participation in the Fund. Thus, the Sixth Circuit concluded that receipt of a residual payment was contingent upon employment and, therefore, wages. This reasoning is fallacious because there was no direct link to receipt of a payment from the residual balance and employment status. To the contrary, an individual could have been employed by an employer who participated in the Local 141 SUB Fund and who contributed monies on the individual's behalf but the individual would still not have received a residual payment if the individual was not a union member. Thus, the *sine qua non* of receiving a residual payment was not employment status, but union status. Accordingly, the Sixth Circuit's conclusion that

there was a direct link between receipt of a payment from the residual balance and employment status is simply wrong.

The Sixth Circuit relied upon decisions from the Second, Fourth and Eighth Circuits in support of its decision that payments from the residual balance are wages subject to FICA and FUTA taxes. 64 F.3d at 249-50. The cases are not analogous to the facts in this case because receipt of a residual balance payment was not attributable to services rendered to employers but was solely dependent upon an individual's union status. In *SLA of Baltimore-ILA Container Royalty v. United States*, 621 F. Supp. 1567 (D.C. Md. 1985) *aff'd*, 804 F.2d 296 (4th Cir. 1986); *NYSA-ILA Container Royalty Fund v. Commissioner*, 847 F.2d 50 (2nd Cir. 1988); and *Lane Processing Trust v. United States*, 25 F.3d 662 (8th Cir. 1994), the courts found the payments to be wages because the payments were directly attributable to services rendered to employers. As explained above, the residual account balance is not attributable to a participant's employment status but to his union status. Therefore, the Sixth Circuit's reliance upon these cases was misplaced.

III. CONCLUSION

This case is significant to thousands of employers, employees, unions and trustees of ERISA-regulated employee benefit plans because there is no clear statutory authority to support the Internal Revenue Service's taxation of the benefit plan assets distribution in this case as "wages" for purposes of FICA and FUTA taxes.

The fact that each plan participant has already paid income tax on his or her distribution should be sufficient to satisfy the hunger of the Internal Revenue Service for revenue. Unless reversed by the Supreme Court, the Court of Appeals' decision in this case allows the Internal Revenue Service to stretch its tentacles into a sea that has not been charted with appropriate and enabling legislation.

This case presents a compelling and important question of public concern and first impression regarding whether the distribution of employee benefit plan residual assets to participants based upon their union membership, rather than the services they rendered to their employers, constitutes "wages" within the meaning of the Federal Insurance Contribution Act ("FICA"), 26 U.S.C. § 3101 *et seq.* and the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. § 3306 *et seq.*

For all the reasons set forth in this Memorandum, the Petition should be granted.

Respectfully submitted,

HAROLD G. KORBEE
Attorney for Petitioner
2500 Cincinnati Commerce Center
600 Vine Street
Cincinnati, Ohio 45202
(513) 852-6082
(513) 852-6087 (Fax)

Of Counsel:

WOOD & LAMPING
C.J. Schmidt

SHEET METAL WORKERS LOCAL NUMBER 141 SUPPLEMENTAL UNEMPLOYMENT BENEFIT TRUST FUND, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.

SHEET METAL WORKERS LOCAL No. 141 SUPPLEMENTAL UNEMPLOYMENT BEN. TRUST FUND v. UNITED STATES

Civil Action No. C-1-92-858

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

1994 U.S. Dist. LEXIS 3022; 73 A.F.T.R.2d (P-H) 1513; CCH Unemployment Ins. Rep. P22,110

February 18, 1994, Decided

SUBSEQUENT HISTORY: Adopting Order of April 14, 1994, Reported at: 1994 U.S. Dist. LEXIS 6147.

COUNSEL: For SHEET METAL WORKERS LOCAL #141 SUPPLEMENTAL UNEMPLOYMENT BENEFIT TRUST FUND, plaintiff: Carl John Schmidt, III, Harold George Korbee, Wood & Lamping – 1, Cincinnati, OH.

For UNITED STATES OF AMERICA, defendant: D. Michael Crites, Hahn Loeser & Parks – 2, Columbus, OH. Jan Martin Holtzman, Department of Justice – 1, Cincinnati, OH. Beverly Ann Ortega, U.S. Dept. of Justice, Tax Division, Washington, DC. Beverly Ortega Babers, Tax Division, U.S. Department of Justice, Washington, DC. For WILLIAM BARR, defendant: D. Michael Crites, Hahn Loeser & Parks – 2, Columbus, OH.

JUDGES: Sherman, Jr.

OPINION BY: JACK SHERMAN, JR.

OPINION: REPORT AND RECOMMENDATION THAT: (1) PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (DOC. 7) BE GRANTED; (2) DEFENDANT'S CROSS SUMMARY JUDGMENT MOTION (Doc. 10) BE DENIED; (3) PLAINTIFF BE AWARDED $ 97,773.23 IN FICA AND FUTA REFUND MONIES, PLUS ALL RELEVANT INTEREST; AND (4) THIS CASH BE TERMINATED UPON THE DOCKET

REPORT AND RECOMMENDATION

This tax refund action concerns whether plaintiff, a union-sponsored supplemental unemployment benefits trust fund (hereinafter, "Fund"), overpaid to defendant, the United States of America (hereinafter, "Internal Revenue Service" or "IRS"), taxes under the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA). See 26 U.S.C. § 3101 et seq. (FICA), § 3301 et seq. (FUTA). Now before the Court is the Fund's motion for summary judgment (doc. 7) to which the Internal Revenue Service has filed a combined memorandum in opposition/cross summary judgment motion (doc. 10), and the Fund has submitted a combined reply in support of its motion/memorandum in opposition to the IRS's motion (doc. 11). Jurisdiction to resolve this dispute is conferred by 28 U.S.C. §§ 1331, 1346(a)(1).

I.

The Fund was created in 1975 to provide unemployment benefits for members of the Cincinnati-based Sheet Metal Workers Local 141. In 1987, Local 141 was consolidated with Sheet Metal Workers Local 24. Accordingly, the Fund was terminated shortly thereafter, and its assets

distributed to Fund participants. Each participant received two payments: (1) a "positive account balance" payment based on employer contributions to the Fund;[1] and (2) a "residual balance" payment, i.e., a proportionate share of the Fund monies remaining once the "positive account balances" were paid. Doc. 7 at 3-5; doc. 10 at 2-3, 6-8. At issue is whether the latter of these payments are "wages" for purposes of FICA or FUTA, and thus taxable.[2]

Believing that the residual balances are not taxable under either statute, the Fund sought a private letter ruling from the IRS. In its ruling, the IRS found the residual balance payments taxable under both FICA and FUTA. Although the Fund disagreed with that reading of the law, it paid to the IRS – in conformance with the letter ruling – $ 88,516.60 in FICA taxes and $ 9,256.63 in FUTA taxes, or a total of $ 97,773.23. The Fund subsequently sought a refund of those monies, which the IRS denied; this action followed. Doc. 7 at 6; doc. 10 at 7-8.

II.

As explained in STA of Baltimore-ILA Container Royalty Fund v. United States, 621 F. Supp. 1567 (D.Md. 1985), aff'd, 804 F.2d 296 (4th Cir. 1986), a case upon which both the Fund and the IRS rely:

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[1] Positive account balance payments were also made to former fund participants. Doc. 7, ex. A (Geis aff.) at 2, P 6.

[2] The Fund agrees that the former payments – the "positive account balances" – are taxable and has, as both parties agree, therefore paid FICA and FUTA taxes on those payments. Doc. 7 at 4; doc. 10 at 7.

Title 26, U.S.C. § 3102 requires every employer to deduct Social Security taxes from wages paid to employees. Section 3111 imposes a matching FICA tax on the employer. Section 3301 imposes an additional FUTA or unemployment tax on employers only.

Section 3121(a) broadly defines the term "wages" {for purposes of FICA} as "all remuneration for employment. . . . " {Accord 26 U.S.C. § 3306(b) (defining "wages" identically under FUTA).} Section 3121(b){(A)} broadly defines "employment" {under FICA} as any service, of whatever nature{,} performed { } by an employee for the person employing him . . . {.}" {Accord 26 U.S.C. § 3306(c)(A) (defining employment" identically under FUTA).} Taken together, subsections (a) and (b) of § 3121 {and subsections (b) and (c) of § 3306} define wages, therefore, as "all remuneration" for "any service."

Id. at 1570 (ellipses and quotations in original; footnotes omitted). In also Spicer Accounting, Inc. v. United States, 918 F.2d 90, 92-93 (9th Cir. 1990); Radtke Corp. v. United States, 895 F.2d 1196, 1198 (7th Cir. 1990) (per curiam); NYSA-ILA Container Royalty Fund v. Commissioner, 847 F.2d 50, 52 (2d Cir. 1988).

III.

A motion for summary judgment should be granted only if the evidence submitted to the Court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 91 L. Ed. 2d 202,

106 S. Ct. 2505 (1986). In opposing a summary judgment motion, the non-movant has the duty to "present affirmative evidence," Anderson, 477 U.S. at 257, and "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Specifically, the non-movant must attach to its opposition memorandum, or otherwise then make reference to, affidavits, answers to interrogatories, deposition transcripts or admissions which "go beyond the pleadings and . . . designate specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324; see also Fed. R. Civ. P. 56(e).

IV.

For reasons that are unclear to the Court, the IRS failed to attach to its opposition memorandum any of the evidentiary materials authorized by Rule 56(e). Nor did the IRS move under Fed. R. Civ. P. 56(f) to stay a ruling on the Fund's motion. Therefore, the Court accepts as true the testimony set forth in the Donald Geis affidavit accompanying the Fund's motion.

In his affidavit, Mr. Geis, a member of the Fund Board of Trustees, explains that the Fund's residual balance payments are not remuneration for services, but, instead, a "reserve generated by prudent investments and competent administration of the contributions made to the { }Fund over a period of years dating back to 1975." Doc. 7, ex. A (Geis aff.) at 2, P 8. In light of that uncontradicted assertion, the Court finds the residual balance payments at issue exempt from FICA and FUTA taxes.

Therefore, the Court RECOMMENDS that the Fund's motion for summary judgment be GRANTED; the IRS's cross summary judgment motion be DENIED; the Fund be AWARDED $ 97,773.23 in FICA and FUTA refund monies, plus all relevant interest; and this ease be TERMINATED UPON THE DOCKET.

Date: February 18, 1994

Jack Sherman, Jr.

United States Magistrate Judge

NOTICE

Attached hereto is the Report and Recommended decision of Honorable Jack Sherman, United States Magistrate, which was filed on February 23, 1994. Any party may object to the Magistrate's findings, recommendations and report within ten (10) days* after being served with a copy thereof or further appeal is waived. See United States v. Walters, 638 F.2d 947 (6th Cir. 1981). Such parties shall file with the Clerk of Court, and serve on all Parties, the Judge and the Magistrate, a written Motion to Review which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made along with a memorandum of law setting forth the basis for such objection, (such parties shall file with the Clerk a transcript of the specific portions of any evidentiary proceedings to which an objection is made).

In the event a party files a Motion to Review the Magistrate's Findings, Recommendations and Report, all

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* Objections due to be filed within 10 days.

other parties shall respond to said Motion to Review within ten (10) days after being served a copy thereof.

SHEET METAL WORKERS LOCAL 141 SUPPLEMENTAL UNEMPLOYMENT BENEFIT TRUST FUND, Plaintiff-Appellee,

v.

UNITED STATES of America, Internal Revenue Service, Defendant-Appellant.

No. 94-3689.

United States Court of Appeals, Sixth Circuit.

Argued June 9, 1995.

Decided Sept. 5, 1995.

Supplemental Unemployment Benefit Trust Fund sought refund of taxes it paid on residual account balances under Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax Act (FUTA). On cross-motions for summary judgment, the United States District Court for the Southern District of Ohio, Herman J. Weber, J., adopted the report and recommendation of the magistrate judge, and held that payments were not wages. Internal Revenue Service appealed. The Court of Appeals, Wellford, Circuit Judge, held that: (1) distributions are "wages" under FICA and FUTA where they are derived solely from employer contributions and are contingent on work requirements or their equivalents, and (2) payments to employee-beneficiaries derived from liquidation of supplemental unemployment benefit trust fund were "wages."

Reversed.

Harold George Korbee (argued and briefed), Wood & Lamping, Cincinnati, OH, for plaintiff-appellee.

Gilbert S. Rothenberg, Frank P. Cihlar (argued), Paula K. Speck, Gary R. Allen, Acting Chief (briefed), U.S. Dept. of Justice, Appellate Section Tax Div., Washington, DC, for defendant-appellant.

Before: WELLFORD, NELSON, and RYAN, Circuit Judges.

WELLFORD, Circuit Judge.

We are presented with a tax refund case that raises a question of first impression in this circuit: whether payments to employee-beneficiaries derived from the liquidation of a supplemental unemployment benefit trust fund are "wages" within the meaning of the Federal Insurance Contributions Act ("FICA") and the Federal Unemployment Tax Act ("FUTA"). The district court concluded that the payments in this case were not wages. For the reasons stated, we REVERSE.

I.

The relevant facts involve little, if any, dispute. In 1975, Sheet Metal Workers Local No. 141 ("Local 141") and Sheet Metal Contractors Association of Greater Cincinnati, Inc., ("Contractors") established the Supplemental Unemployment Benefit Trust Fund ("Fund") pursuant to the provisions of a collective bargaining agreement

(CBA).[1] The purpose of the Fund was to provide supplemental unemployment benefits, accident and sickness disability benefits, and severance pay to union members who were involuntarily unemployed. The Contractors contributed all of the monies in the Fund, and the benefits were to be paid from the contributions as well as interest, dividends and income derived therefrom.

The Fund established an individual account for each union member. Each beneficiary received credit in his or her account for each month that a contractor contributed, or was legally obligated to contribute, on his or her behalf. A contractor's obligation to contribute to the Fund was based on the number of hours worked by each covered beneficiary on a monthly basis. A beneficiary's benefits were not limited to the amount of the contractor's contribution. A beneficiary could draw benefits up to $10,000.00 in excess of the amount contributed by his or her employer. If a beneficiary did not draw from his account an amount equal to the contribution by his or her employer, the beneficiary retained a "positive account balance."

In December of 1986, Local 141 merged with Local 224 of Dayton, Ohio and Local 98 of Columbus, Ohio. The new local, Local 24, presented its members with an alternative benefit plan which was intended to replace the benefit plan formerly offered by the Fund. The union membership voted to merge the Fund into the new benefit plan offered by Local 24. Following this vote, the

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[1] This agreement established the Fund to qualify as a tax exempt employee benefit plan under the Taft-Hartley Act and the Employee Retirement Income Security Act of 1974 (ERISA).

Contractors and Local 24 negotiated a new CBA which discontinued all contributions to the Fund. The Contractors and Local 24 subsequently terminated the Fund and decided to distribute all assets to the beneficiaries.

In December of 1989, the trustees of the Fund distributed to the beneficiaries a total of $1,839,292.00. Each beneficiary received a proportionate payment in accord with his or her "positive account balance." The Fund defined the positive account balance as "an account that has an aggregate of more contributions paid into the Trust Fund then [sic] the aggregate of benefits paid out to the employee at the time the claim for benefits is made." Following the distribution of the positive account balance, $1,341,388.00 in assets remained for distribution. The Fund labeled these assets the "residual account balance" and the assets were to be distributed to "all living Plan participants who ha[d] established five or more consecutive years of participation in the . . . Plan." The trustees prorated each beneficiary's payment based on the beneficiary's years of service.

The Fund conceded that the payments from the positive account balance were wages within the meaning of FICA and FUTA and were, thus, subject to withholding tax. Prior to distributing the residual account balance, however, the Fund sought a private letter ruling from the Internal Revenue Service ("IRS") as to whether the residual account balance constituted wages for which FICA and FUTA required employer withholding. In its ruling, the IRS found the residual balance payments taxable under both FICA and FUTA. Although the Fund disagreed, it paid to the IRS – in conformance with the letter ruling – $88,516.60 in FICA taxes and $9,256.63 in FUTA

taxes, or a total of $97,773.23. The Fund subsequently sought a refund of those monies, which the IRS denied. This action followed.

Both parties moved for summary judgment, and the district court referred the matter to a magistrate judge. In support of its motion, the Fund submitted the affidavit of Donald Geis, a member of the Fund's board of trustees. In his affidavit, Geis averred that the residual balance payments were not wages because they were not distributed in return for services rendered to the Contractors but were merely payments from a "reserve generated by prudent investments and competent administration of the contributions made to the Fund over a period of years dating back to 1975." The IRS did not submit evidentiary materials in opposition to the allegations in the Geis affidavit. Relying on the truth of the affidavit, the magistrate judge recommended that the district court grant the Fund's motion for summary judgment. Without further analysis, the district court adopted the report and recommendation of the magistrate judge and ordered the IRS to refund $97,773.23, plus interest.

II.

Since the district court resolved this case on summary judgment, we review its decision *de novo*. *Henegar v. Banta*, 27 F.3d 223, 225 (6th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 664, 130 L.Ed.2d 599 (1994). We apply the same legal standard, Federal Rule of Civil Procedure 56(c), utilized by the district court. Rule 56(c) provides that a

party is entitled to summary disposition "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c). In making this determination, we view the evidence in the light most favorable to the non-movant. *Henegar*, 27 F.3d at 225 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970)).

Rule 56(e) also provides that

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

FED.R.CIV.P. 56(e); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (citing requirement of Rule 56(e)). In the case at bar, the magistrate judge relied heavily on Rule 56(e) because the IRS failed to offer any rebuttal evidence to counter the Geis affidavit regarding the source of funds used for the residual account payments. The Fund argues that the IRS cannot dispute this finding on appeal and that the magistrate judge was correct in concluding that the finding was dispositive in this case. The IRS responds that it did not rebut the Geis affidavit because the truth of his assertion therein is immaterial to whether the residual account

payments were wages under FICA and FUTA. In other words, the IRS challenges the conclusive effect given to the Geis affidavit by the magistrate judge.

We agree with the IRS' contention that the source of the residual account payments is not dispositive as to whether the payments are wages. If the original contributions to the Fund had come from Local 141 or individual union members, then the magistrate judge's finding might be supportable. In that case, the residual account distributions would be income derived from the sound administration of the union's money. Article VI, section 6.1 of the trust agreement, however, clearly indicates that only the employers – not individual union members – contributed to the Fund. That same section expressly acknowledges that "interest, dividends and other income" derived from the employers' contributions were to be used to pay benefits. Therefore, the fact that the residual account payments derived from wise investment of the corpus is not dispositive as to whether the payments were wages. Employees cannot claim that income derived from investment of the trust corpus is the fruit of their ownership when they never contributed to the corpus itself. *Compare Lane Processing Trust v. United States*, 25 F.3d 662, 655-66 (8th Cir.1994) (holding that payments to employees from trust fund were wages and not the fruit of sound investments because employees had no ownership interests in the corpus of the trust and distributions were based on length of service to employer). Accordingly, we find that the magistrate judge erred, as a matter of law, by giving conclusive effect to the Geis affidavit.

III.

FICA and FUTA define wages as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. §§ 3121(a), 3306(b). Employment is defined as "any service, of whatever nature, performed . . . by an employee for the person employing him." *Id.* §§ 3121(b)(A), 3306(c)(A).[2] "Taken together, subsections (a) and (b) of § 3121 [and subsections (b) and (c) of Sec. 3306] define 'wages,' therefore, as 'all remuneration' for 'any service.' " *STA of Baltimore-ILA Container Royalty Fund v. United States*, 621 F.Supp. 1567, 1570 (D.Md.1985), *aff'd*, 804 F.2d 296 (4th Cir.1986).

The IRS contends that the only relevant inquiry is whether the payments were remuneration for services

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[2] The Fund does not contest that it was the employer for the purposes of FICA and FUTA. Thus, if the disputed payments were "wages," the Fund clearly served as the employer for withholding purposes. *See Otte v. United States*, 419 U.S. 43, 50-51, 95 S.Ct. 247, 253-54, 42 L.Ed.2d 212 (1974) (holding that bankruptcy trustee was the "employer" within the meaning of FICA and FUTA for the purpose of withholding where trustee distributed wage payments to employees of bankrupt employer). In *In re Laub Baking Co.*, 642 F.2d 196, 198-99 (6th Cir.1981), we followed *Otte* in holding that a bankruptcy trustee was an employer under FICA and FUTA when making priority wage payments to employees for services rendered to the debtor. We noted that, under FICA and FUTA, an employer " 'means "the person having control of the payment of such wages." " *Id.* at 198 (quoting *Otte*, 419 U.S. at 50, 95 S.Ct. at 253 (quoting 26 U.S.C. § 3401(d)(1))).

rendered to the contributing contractors. The IRS suggests that, because a beneficiary's length of service with a participating contractor determined his or her eligibility for residual balance payments, the payments were remuneration for past services. In short, the IRS contends that "payment tied to hours of past service is quintessentially remuneration for employment." Brief of Appellant at 14.

The IRS cites the trust agreement to support its contention that the disputed payments were contingent on past service to employers. For example, a covered employee could only acquire credits (*i.e.*, contributions from a contractor) by working more than sixteen hours in a month, and an employee had to earn twenty-five credits within a two year period to obtain minimal eligibility. The only exception to the work requirement was for work equivalents (*e.g.*, injury or illness) compensated under the state worker's compensation law and, if an employee experienced a two year break-in-service with a participating contractor, the employee forfeited all credits. In addition, an employee's eligibility for a share of the residual account balance was conditioned solely on the employee being a living participant in the Fund for five or more consecutive years, and the amount of the employee's payment was directly proportional to the length of the employee's participation in the Fund.

The IRS relies on *STA of Baltimore-ILA Container Royalty Fund v. United States*, 621 F.Supp. 1567 (D.Md.1985), *aff'd*, 804 F.2d 296 (4th Cir.1986), *NYSA-ILA Container Royalty Fund v. Commissioner*, 847 F.2d 50 (2d Cir.1988) and *Lane Processing Trust v. United States*, 25 F.3d 662 (8th Cir.1994). In *STA of Baltimore*, the International Longshoreman's Association (ILA) and the Steamship Trade

Association (STA) established a trust fund, pursuant to the terms of a CBA, by which members of the union could draw benefits to compensate them for lost employment due to a technological advance in ship loading known as "containerization."[3] *STA of Baltimore-ILA Container Royalty Fund*, 621 F.Supp. at 1569. Under the CBA, the STA employers contributed to the fund based on the degree to which a given ship was compatible with containerization. Any union member who worked at least 700 hours in one of the years covered by the CBA was eligible for benefits. *Id.* at 1570. After deducting the cost of administering the fund as well as a reserve from the STA's total contributions, the trustees of the fund distributed equal shares of the balance to eligible union members. *Id.* After paying FICA and FUTA taxes to the IRS, the trustees sought a refund. *Id.* When the IRS failed to act on the requested refund, the trustees brought a civil action in federal district court. *Id.*

The trustees argued that the containerization fund did not owe FICA and FUTA taxes because the distributions were not wages. *Id.* at 1571. In rejecting this contention, the district court relied primarily on the fact that the trust agreement conditioned eligibility for payments on past service to an STA employer. *Id.* at 1571-72. The court noted that a union member's eligibility turned on obtaining a minimum of 700 hours of past service to an STA employer and that time off for sickness or injury did not count in the computation of the minimum hour requirement. *Id.* at 1572. Consequently, the district court held

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[3] "Containerization" reduced the need for manual labor to load cargo on to ships.

that the payments were wages within the meaning of FICA and FUTA. *Id.* at 1575. On appeal, the United States Court of Appeals for the Fourth Circuit affirmed, adopting the district court's opinion as its own. *See* 804 F.2d 296 (4th Cir.1986).

Another circuit in a similar case involving a container royalty fund followed *STA of Baltimore. NYSA-ILA Container Royalty Fund,* 847 F.2d at 52-53 (holding that payments to longshoreman from a containerization fund were wages within the meaning of FICA and FUTA). In that case, however, eligibility was not determined solely by satisfying a minimum work requirement. *Id.* Though a longshoreman still needed 700 hours of past service to be eligible for benefits, a union member could satisfy the requirement by counting periods when he or she was receiving unemployment and worker's compensation. *Id.* at 51. The trustees argued that, unlike *STA of Baltimore,* it was theoretically possible for a union member to receive payments without ever working for a shipper. *Id.* at 52-53. Consequently, the trustees contended that the payments could not be remuneration for past services. *Id.* The Second Circuit rejected this argument, noting that the alternate means of satisfying the minimum work requirement were "all . . . contractually recognized as *work equivalents.*" *Id.* at 53 (emphasis added).

In a more recent case, Lane Processing Trust, still another circuit court considered whether distributions from a trust, which held the stock of a company in receivership for the benefit of the employees, were wages within the meaning of FICA and FUTA. *Lane Processing Trust,* 25 F.3d at 665. In anticipation of liquidation, the sole shareholders of Lane Processing Company, a closely

held corporation, placed their shares of stock in trust, naming the employees as beneficiaries. *Id.* at 663. The trustees reversed the company's financial fortunes, ultimately selling the company to Tyson Foods at a substantial premium. *Id.* at 664. In accord with the terms of the trust document, the trustees distributed a portion of the proceeds from the sale to the employees. *Id.* The amount of each employee's distribution turned on two factors: 1) where the employee worked, and 2) the employee's length of service with the company. *Id.* Only current employees were eligible. *Id.* The trustees conceded that the payments were subject to federal income tax, but disputed whether the payments were wages within the meaning of FICA and FUTA. *Id.* The Eighth Circuit concluded that the proceeds from the sale of the stock were payments in remuneration for past services because eligibility was "based on factors traditionally used to determine employee compensation, specifically, the value of the services performed by the employee, [and] the length of the employee's employment." *Id.* at 665.

The Fund argues that these cases are distinguishable on the grounds that the holdings in those cases turned on a finding that the trust fund payments were directly attributable to services rendered to employers. The Fund contends that in this case the residual account payments did not depend on the employees' relationship with the employers, but rather their union status and years of participation in the Fund. As the IRS points out, however, "[e]mployment (past or current) by a union contractor was the *sine qua non* for Plan participation." Reply Brief of Appellant at 4. Although it was possible for a person to

be employed as a sheet metal worker and not be a participant in the Fund (*i.e.*, working for a non-union contractor who was not obligated to contribute), it was not possible to be a member of the Fund unless the person worked, or had worked, for a participating union contractor. The substance of the transaction, rather than its form, controls our inquiry as to whether the disputed payments were wages. *See, e.g., Spicer Accounting, Inc. v. United States,* 918 F.2d 90, 93 (9th Cir.1990); *Joseph Radtke, S.C. v. United States,* 895 F.2d 1196, 1197 (7th Cir.1990) (per curiam). We, therefore, agree with the IRS that receipt of a residual balance payment was directly contingent on past or present employment.[4]

In situations analogous to the present case, the three cases cited focused on the trust fund's "eligibility" requirements to determine whether a payment to an employee was remuneration for past or present services. After considering the reasoning of the other circuits, we agree that eligibility requirements provide the most accurate test to determine whether a payment is truly in consideration for services. *Cf.* Rev.Rul. 80-124, 1980-1 C.B. 212. In the instant case, the Contractors' contributions to the Fund represented part of the benefit package agreed to by Local 141. *Compare Educational Fund of Elec. Indus. v. United States,* 426 F.2d 1053, 1056, 1057 (2d Cir.1970)

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[4] The Fund does not contend that these payments were supplemental unemployment benefits which are exempt from FICA and FUTA taxes. *See* Rev.Rul. 75-461, 1973-2 C.B. 394 (explaining that to qualify as a supplementary unemployment benefit the payments must be made on account of involuntary separation or disability and cannot be paid when employee is working.

(holding that tuition payments to union members from an educational trust fund were wages under FICA and FUTA, because "[t]he payments ultimately derived from the employers and represented a portion of the agreed upon remuneration for services performed by the employees"). We believe that where the disputed payments are derived *solely* from employer contributions and are contingent on work requirements or their equivalents, the distributions are wages under FICA and FUTA. We, accordingly, REVERSE the judgment of the district court and DENY the taxpayer's refund claim.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE BOARD OF TRUSTEES OF THE SHEET METAL WORKERS LOCAL UNION NO. 141 SUPPLEMENTAL UNEMPLOYMENT BENEFIT TRUST FUND Plaintiff vs. SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 24, et al. Defendants	CASE NO. C-1-89-183 (Judge S. Arthur Spiegel) ORDER REGARDING MOTIONS FOR SUMMARY JUDGMENT OF PLAINTIFF AND DEFENDANT SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 24 (Filed Jul. 23, 1990)

I. INTRODUCTION

This matter came on for a hearing on June 28, 1990, regarding the separate motions for summary judgment filed by the Plaintiff The Board of Trustees Of The Sheet Metal Workers Local Union 141 Supplemental Unemployment Benefit Trust Fund ("the Trustees") and the Defendant Sheet Metal Workers International Association Local Union No. 24 ("Local 24"). (Doc. 19, 29, 48). All parties were notified of the hearing. Plaintiff filed a memorandum in opposition to Local 24's motion for summary judgment and Local 24 filed a memorandum in opposition to Plaintiff's motion for summary judgment. (Doc. 29, 32). Defendant John Hasselbeck filed a response to

Local 24's Motion and Defendant Richard L. Scott filed several responses to Plaintiff's motions. (Doc. 37, 38, 39). Defendants Sheet Metal Contractors Association of Greater Cincinnati, John R. Quinn, Anthony J. Rider, Robert Hartkemeyer, Douglas C. Eveslage, David M. Young, Philip C. Young, Richard G. Roesel, and Raymond B. Stutler, did not respond to Plaintiff's Motions or Local 24's Motions. At the hearing, we granted Plaintiff's motion for leave to file supplemental memoranda in support of its motions for summary judgment. (Doc. 49, 53). The supplemental memoranda were subsequently filed. (Doc. 55, 56).

The Trustees filed this action seeking this Court's approval of their plan to terminate the Sheet Metal Workers Local Union 141 Supplemental Unemployment Trust Fund ("SUB FUND") and transfer and dispose of the SUB FUND assets.

II. FACTUAL BACKGROUND

The facts in this case are undisputed. The SUB FUND is an employee welfare benefit plan administered under, and in accordance with, the provisions of the Taft-Hartley Act and the Employee Retirement Income Security Action of 1974 ("ERISA"). The SUB FUND was established in 1975. Since then, the Trustees have administered the SUB FUND for the exclusive benefit of the SUB FUND participants and beneficiaries without any claims, suits, judgments or criticisms of their administration by the Department of Labor, the Internal Revenue Service or any other governmental agencies.

In approximately October of 1986, and during a period of economic decline in the sheet metal industry, Sheet Metal Workers International Association Local Union No. 141 ("Local 141") was placed in trusteeship by the Sheet Metal Workers' International Association ("the International"). In approximately December of 1987, Local 141 was amalgamated with Local 224 in Dayton, Ohio, and Local 98 in Columbus, Ohio, to form Local 24.

As part of the reorganization and amalgamation of Local 141, the International presented employee benefit plan alternatives to members of Local 24 which would involve the termination and/or merger of the Local 141 Pension Fund with the National Pension Fund, the Local 141 Health and Welfare Fund with the National Health Fund, and the SUB FUND with the National Stabilization Agreement of the Sheet Metal Industry Trust Fund ("SASMI"). The International selected a consulting firm which compared the different plans, benefits and costs and reported their findings to Local 24 members.

On June 18, 1988, Local 24 members voted 156 to 65 to merge the SUB FUND with SASMI, and the Local 141 Health and Welfare Fund with the National Health Fund. After Local 24 members voted to merge the SUB FUND with SASMI, Defendant Sheet Metal Contractors Association of Greater Cincinnati, Ohio ("Contractors") and Local 24 negotiated a new collective bargaining agreement which provided that beginning in the summer of 1988 the hourly contributions being paid to the SUB FUND were to be paid to SASMI. With this new agreement, all contributions to the SUB FUND were terminated and the continued funding of the SUB FUND ended. On October 26, 1988, and pursuant to these provisions, Local

24 and the Contractors resolved to terminate the SUB FUND on December 31, 1988 or as soon as practical, and to transfer and distribute assets in accordance with the Trust Agreement, the Plan of Benefits and the applicable law, after payment of expenses ("the Resolution"). The Resolution also provided that the Trustees' decision was final and conclusive regarding any interpretation of the Trust Agreement or Plan of Benefits and affecting the termination of the SUB FUND and transfer and distribution of assets.[1]

The Contractors and Local 24 enacted the Third Amendment to the Trust Agreement simultaneously with adoption of the Resolution and amended Section 7.1 and replacing it with the following:

> 7.1 The Trustees shall have full and final authority to dispose and distribute all assets and enact any amendments to the Trust Agreement and/or the Plan necessary thereto that in the sole judgment of the Trustee appear to be in the best interest of the Plan Participants.

The Trustees determined that it would be in the best interests of the SUB FUND participants to transfer sufficient SUB FUND assets to the National Health Fund to purchase health and welfare coverage for all eligible SUB FUND participants and beneficiaries because the assets of the Local 141 Health and Welfare Fund were insufficient

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[1] The SUB FUND termination was made pursuant to Article VIII, Section 8.2 of the Agreement and Declaration of Trust of the SUB FUND ("Trust Agreement") which provides that the SUB FUND may be terminated by joint resolution of the sponsoring parties; that is, Local 24 and the Contractors.

to purchase such coverage. The Trustees also determined that it would be in the best interests of SUB FUND participants to transfer sufficient SUB FUND assets to SASMI to obtain unemployment and related benefits for SUB FUND participants and beneficiaries effective January 1, 1989. These transfers were necessary to attempt to insure that none of the participants suffered a lapse in supplemental unemployment benefit coverage until they could earn sufficient credits under SASMI following termination of contributions to the Local 141 SUB FUND by their employers in June of 1988.

To obtain health and welfare coverage for SUB FUND participants and beneficiaries under the National Health Fund, the Trustees transferred $152,336 from the SUB FUND to the National Health Fund. To obtain coverage for SUB FUND participants and beneficiaries under SASMI, the Trustees transferred $281,880 from the SUB FUND to SASMI. The National Health Fund and SASMI are qualified plans as defined by applicable laws, rules and regulations.

The Trustees distributed to Plan participants approximately $1,839,292.00 in December, 1989. This distribution was a payment to each eligible participant equal to the amount of his positive balance as shown by the Plan records for the plan year ending August 31, 1989. Section 3.16(b) of the Plan defines "a positive balance account" as "an account that has an aggregate of more contributions paid into the Trust Fund then [sic] the aggregate of benefits paid out to the employee at the time the claim for benefits is made."

This distribution was a payment in full satisfaction and payment of any supplementary separation benefit that a participant is entitled to receive under Section 3.13 of the Plan. Section 3.13 provides for a supplementary separation benefit to an employee who becomes totally disabled as determined by the Social Security Administration or to an employee who becomes permanently separated from the sheet metal trade. For other than disability cases, this benefit has generally been paid only upon retirement or when a participant has chosen to work permanently in an occupation other than the sheet metal trade. The amount of the supplementary separation benefit for each eligible participant is a sum equal to 100% of the contributions credited and paid into the Fund by employers on behalf of the participant less any benefits of any type previously paid by the Fund to the participant.

There remains approximately $1,341,388.00 in assets to be distributed. The distribution of these funds, the so-called "residual account balance", is intended to be a final distribution and is proposed pursuant to Section 9.1 of the Plan as set forth in the 36th Amendment (Exhibit E to the Complaint) to "all living plan participants who have established five or more consecutive years of participation . . . in the . . . Plan, as determined by the Plan records on the Plan termination date." This will be the final pay out of funds. Thereafter, the Plan will terminate and the Trustees will resign and the participants will have received all the benefits.

On June 16, 1989, the Trustees notified the U.S. Department of Labor ("DOL") of their formal request for an advisory opinion that the termination and proposed

distribution did not constitute a breach of fiduciary duty or a prohibited transaction or violate any law, rule or regulation. DOL eventually responded in writing on June 14, 1990, and offered no opinion concerning the Trustees' proposed actions. A copy of the DOL letter is attached to Plaintiff's Supplemental Memorandum and before the Court at the time of this decision. (Doc. 55).

The Trustees made a similar request to the Internal Revenue Service ("IRS") on June 13, 1989. The IRS advised the Trustees on April 27, 1990, that their proposed actions were proper. The IRS concluded the Plan's exempt status would not be affected by the Trustees' distribution of assets. A copy of the IRS determination letter was attached to Plaintiff's Supplemental Memorandum and before the Court at the time of this decision. (Doc. 56).

III. DISCUSSION

1. STANDARD OF REVIEW

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476-1481 (6th Cir. 1989); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Rowland v. Mutual Life Ins. Co. of New York*, 689 F. Supp. 793, 794 (S.D. Ohio 1988). For the reasons explained below, Plaintiff has established that the termination of the SUB FUND and distribution of SUB FUND assets is

proper, is in the best interest of the SUB FUND participants and beneficiaries, and the Trustees are not breaching any fiduciary obligation or violating the terms of ERISA.

2. THE MERGER AND TERMINATION OF THE SUB FUND COMPLIES WITH PLAN DOCUMENTS.

The Trustees proposed termination of the Trust complies with the SUB FUND documents. Section 8.2 of the SUB FUND Trust Agreement provides:

> 8.2 *Termination by Joint Resolution.* The Trust may be terminated by a resolution adopted by the Union and a resolution adopted by the Board of Directors of the Sheet Metal Contractor's Association of Greater Cincinnati, Inc., parties hereto.

On October 26, 1988, the Local Union and the Contractors adopted a Joint Resolution terminating the SUB FUND on December 31, 1988, or as soon thereafter as practical. Thus, we find that the Trustees' plan to terminate the SUB FUND comports with this section of the Trust Agreement and is, in all respects, proper and lawful.

The Trustees' actions of transferring SUB FUND assets to the National Health Fund to obtain health and welfare benefits for participants and transferring SUB FUND assets to SASMI to obtain unemployment coverage comports with Section 7.1 of the Trust Agreement. This provision provides:

> *Section 7.1.* The Trustees shall have the full and final authority to dispose and distribute all assets and enact any amendments to the Trust Agreement and/or plan necessary thereto that in the sole judgment of the Trustees appear to be in the best interests of the Plan participants.

Since, in the Trustees' judgment, the transfer of assets was in the best interests of the Plan participants, we find that the Trustees actions comply with the Trust Agreement and were, in all respects, proper and lawful.

The Trustees contemplated distribution of SUB FUND assets also complies with the Trust Agreement and Plan of Benefits. The Trustees contemplate paying out all remaining funds the so-called "residual account balance," to participants with five years or more of participation in the SUB FUND. Originally, the Trustees contemplated distributing the "residual account balance" to all participants including persons who were no longer Union members. However, the Trust Agreement and the Plan forbid the distribution of the remaining funds to former Union Members. Section 1.16 of the Plan provides:

> "Participant" means any employee or former employee of an employer, or any member or former member of Sheet Metal Workers Local Union 141, who is or may become eligible to receive a benefit of any type from the Sheet Metal Workers Local Union No. 141 Supplemental Unemployment Benefit Plan. . . .

Except for those members of the Union who participated in the SUB Plan and retired from the Union in good standing, those persons who have been permanently separated from the trade, as defined in Article III, Section

(B)(6), are not entitled to share in this final distribution, since the payment to them of their positive balance, which has already been accomplished, "operates as a final and complete discharge of all claims for any other benefits payable under [the] Plan . . . ". Article III, Section 3.13(B)(8). This Plan was intended to benefit Union members, not to provide a windfall for those who left the Union to work for non-union contractors.

We hold that former Union members are not participants, since they are not eligible to receive a benefit from the SUB FUND. Therefore, the distribution of the residual account balance may only be paid pursuant to the 36th Amendment to the Plan to current members of Local 24 with five or more years of participation in the SUB FUND and those who have retired as members of the Union in good standing subsequent to the commencement of the earned service credit period for the Plan, which began on September 1, 1975, as described in Section 3.4 of the Plan.

3. **THE TRUSTEES' ACTIONS COMPORT WITH APPLICABLE LAWS, RULES AND REGULATIONS.**

(a) The Trustees' actions Comply With 29 U.S.C. §1104

Section 404 of ERISA, 29 U.S.C. §1104, defines the fiduciary duties of the Trustees. 29 U.S.C. §1104 provides:

> §1104. Fiduciary duties
>
> (a) Prudent man standard of care
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan

> solely in the interest of the participants and beneficiaries and –
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> . . . .
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.[2]

The Trustees' termination of the SUB FUND and distribution of assets to current Union members meets this standard. Substantially, all of the SUB FUND participants are afforded benefits under SASMI. Therefore, the Trustees' action is in the best interest of participants and beneficiaries and has the purpose of providing benefits to participants and beneficiaries. Also, since the termination

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[2] The SUB FUND was established under §302(c)(5) of the LMRA. ERISA codifies the strict fiduciary standards that a §302(c)(5) trustee must meet. *NLRB v. Amex Coal Co.*, 453 U.S. 322, 332 (1981). Thus, if the Trustees meet ERISA's fiduciary standard, then they meet the standards set forth in §302(c)(5).

conforms with the Trust Agreement and Plan of Benefits, the trustees' actions are prudent. Therefore, we find that the termination is in compliance with 29 U.S.C. §1104 and the Trustees meet their fiduciary obligations.

(b) The Trustees' proposed actions comply with 29 U.S.C. §1106.

Section 406 of ERISA, 29 U.S.C. §1106 defines the prohibited transactions between a plan and a party in interest. 29 U.S.C. §1106 provides:

§1106. Prohibited Transactions.

(a) Transactions between plan and party in interest except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect –

(D) transfer to, or use by or for the benefit of a party in interest, of any assets to the plan; or

29 U.S.C. §1002(14) defines a party in interest it provides:

(14) The term "party in interest" means, as to an employee benefit plan –

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of –

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

Since SASMI and the National Health Fund are not "parties in interest" as defined in 29 U.S.C. §1106, we find that the transfers of SUB FUND assets to these organizations are not a prohibited transaction. *See, Board of Trustees v. Universal Enterprises, Inc.*, 5 EBC 1208 (S.D. Ga. 1983) *aff'd*, 751 F.2d 1177 (11th Cir. 1985).

IV. CONCLUSION

The Court finds that there is no genuine issue as to any material fact and that the Plaintiff Trustees are entitled to judgment in their favor as a matter of law.

The only material legal issue raised by the Defendant Union's cross-motion for summary judgment relates to

the Union's objection to including in the final distribution of assets those former Union members who left the Union to work for non-union contractors. This Court agrees that persons in this category should not be considered as participants in the Plan for purposes of such distribution. To this extent, the Union's motion for summary judgment is granted and the Plaintiff Trustees' plan for distribution shall be modified. The Union's motion in all other respects is overruled.

The Court concludes and DECLARES that consistent with this opinion, the termination of the SUB FUND, the transfer of certain assets to the National Health Fund and SASMI, and the distribution of the remaining assets to current Union members and retirees with five or more years participation in the SUB FUND is proper and is in the best interest of the SUB FUND participants and beneficiaries. We further conclude and declare that the Trustees are not breaching any fiduciary obligation and are not violating the provisions of ERISA. We also declare that neither the Union nor the Sheet Metal Contractors Association of Greater Cincinnati, as sponsors of the SUB FUND, are breaching any fiduciary obligation or violating ERISA.

IT IS SO ORDERED.

/s/ Arthur Spiegel
Judge S. Arthur Spiegel